

## QUARTERLY REPORT

July - September 1998

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at <kcmdowel@doe.state.in.us>.

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## **FIRST FRIDAY: PUBLIC ACCOMMODATION OF RELIGIOUS OBSERVANCES**

Public school districts are often faced with requests from personnel and from parents and students to be excused from school attendance in order to participate in religious observances important to their respective faith traditions. These observances range from standard holy days to week-long revival camps that often seem to occur in the autumn. State legislatures typically establish legal holidays as well as exceptions to compulsory attendance, all within a framework of a mandated instructional school year for accredited schools. Whether or not a public school will (or can) accommodate a religious observance is usually a matter of local discretion. This can be complicated depending upon the reasonableness of the request and the need to balance the absence with local attendance policies.

Indiana is a typical state in this regard. Its General Assembly, by statute, has created fourteen (14) “legal holidays.” One of these legal holidays is “Good Friday, a movable feast day.” I.C. 1-1-9-1. However, the legislature does not require public school districts to observe any of these legal holidays, leaving this largely to their discretion. I.C. 20-10.1-2-4.<sup>1</sup> Nevertheless, “Good Friday” is a significant Christian holy day that has not become secularized as a “holiday” as Christmas has.<sup>2</sup> As a part of the Paschal Triduum culminating with Easter and the observance of the resurrection of Jesus Christ, “Good Friday” is central to the Christian faith. There are obvious difficulties when publicly funded institutions seemingly observe certain holy days but not others.

Such was the situation in Bridenbaugh v. O’Bannon, Cause No. IP-971132-C (B/S), (S.D. Ind., July 13, 1998). The plaintiff challenged the practice of state government in Indiana closing on Good Friday, asserting that to do so “establishes a religious holiday as a state holiday and represents the state favoring one religion over other religions and over non-religion.” (Slip Opinion, p. 4). The Court noted that Good Friday is a legal holiday in Indiana and has been since 1941. Although statute refers to this as a “movable feast day,” it is never moved, but is observed on the day typically observed by the majority of American Christians.<sup>3</sup> Although Good

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<sup>1</sup>The exercise of discretion is often a practical matter. Indiana’s statewide assessment—the Indiana Statewide Testing for Educational Progress (ISTEP+)—used to be administered in the spring. When the ISTEP+ was moved to an autumn testing schedule, great care had to be taken to ensure testing dates did not fall on the significant Jewish observances of Yom Kippur and Rosh Hashanah. The State Board of Education, when it approved the 1999 ISTEP+ testing dates at its meeting of October 8, 1998, prohibited testing on Yom Kippur (September 20). Testing dates in 1999 do not interfere with Rosh Hashanah.

<sup>2</sup>“Christmas Day, December 25” is a legal holiday in Indiana. I.C. 1-1-9-1.

<sup>3</sup>Although it was argued Indiana’s General Assembly probably intended “movable feast day” to mean the Governor could shift observance to other days in the year in order to provide

Friday is an obvious religious holy day associated with a particular religion, the state successfully articulated a secular purpose for the observance: It provides a Spring holiday for state employees (Slip Op., p. 3).

Without a holiday on Good Friday, state employees would not have a holiday for four months in a non-election year (from Martin Luther King, Jr.'s Birthday to Memorial Day). The dearth of holidays during this period is due to the shifting of Washington's and Lincoln's Birthdays to Thanksgiving and Christmas (Slip Op. at 3). Although the state requires other state employees to ask permission to take off work for their religious holy days and must use vacation time, a personal day, or compensatory time, the court was satisfied the state had a secular purpose for closing most of state government on Good Friday: (1) to give state employees a "spring holiday" during an otherwise lengthy period of work without respite; (2) "a generous number of holidays bolsters employee efficiency"; and (3) Good Friday is a more "logical choice" than another Friday or Monday in Spring because a significant number of state employees would take off that day anyhow. (Slip Op. at 6-8).<sup>4</sup>

The Court in Bridenbaugh relied heavily upon the first two cases below, one involving Illinois while the other involved Hawaii.

1. Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995). Illinois, like Indiana, made Good Friday a State holiday in 1941. In 1989, unlike Indiana, the Illinois legislature rescinded Good Friday as a state holiday but retained it as a school holiday for all schools below the college level.<sup>5</sup> The district court judge enjoined the Illinois law, and the 7th Circuit affirmed. The following are pertinent findings:
  - "[A] law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect in promoting religion is too attenuated to worry about." At 620.
  - Although Christmas and Thanksgiving—and, increasingly, Easter—have become

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extended weekends for state employees (the way observance of Lincoln's and Washington's February birthdays are observed in conjunction with Thanksgiving and Christmas), Good Friday is not an established "feast day" even among Christian theologians. Disputes as to the proper observance of Easter have plagued the Christian Church from at least the second century. See The History of the Church, "The Controversy About the Easter Festival," by Eusebius.

<sup>4</sup>The court noted that a significant number of public and private employers are closed that day. However, for the 1996-1997 school year, only 89 of 293 public school districts were closed for Good Friday. (Slip Op. at 4, 7).

<sup>5</sup>Illinois, by statute, does excuse school children from attending school on other days if their religion requires their absence. Metzl, at 619.

secularized, “Good Friday...is not a secular holiday anywhere in the United States (with the possible exception of Hawaii...)” See Cammack, *infra*. Id.

- “[T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion, unless there is a secular justification for the differences in treatment.” At 621. Emphasis original.
- “...Illinois might have argued that the contemporary purpose of the Good Friday public school closing is to provide a long spring weekend, Good Friday being chosen rather than a different Friday in the spring, or a Monday, because many students and teachers would stay away from school anyway on Good Friday even if school were open.” At pp. 622-23.
- “Modern cases dealing with the establishment clause are largely about symbols rather than about the practical reality of American religious practices.” At 624.

2. Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), reh. en banc den., 944 F.2d 466 (9th Cir. 1991). Plaintiffs challenged Hawaii’s declaration that Good Friday is a legal holiday. Hawaii, just like Illinois and Indiana, enacted in 1941 a bill making Good Friday a public holiday. In addition, paid leave on Good Friday (in fact, all holidays) is a part of Hawaii’s statewide collective bargaining agreement affecting 65 percent of the public employees. The federal district court granted summary judgment to Hawaii, which the 9th Circuit affirmed. The Circuit Court made the following determinations:

- “If the Court can describe the ‘actual purpose’ of the act as religious, due to an absence of a sincerely held, legitimate secular purpose, then the legislation must fall.” At 773.
- “When there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy [First Amendment analysis].” Id.<sup>6</sup>
- The fact that a “common” or “uniform day of rest” selected by the legislature is also a religious holy day is irrelevant where the purpose for selecting the date is secular. At 778.
- “[T]he Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefitted from the three-day weekend created as a result of the

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<sup>6</sup>Illinois, in originally passing its law, indicated the religious purpose. Indiana expressed no reason. Hawaii’s legislative history indicates a primary secular reason: to create a holiday. At 777.

holiday. [District court citation omitted.] Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii.” *Id.*<sup>7</sup>

- “Although political divisiveness [non-Christian sects seeking legislative enactments declaring as legal holidays some of their holy days] has been considered in establishment clause cases [citation omitted], it has never been relied on as an independent ground for holding a government practice unconstitutional.” At 781.
  - “The Hawaii law does not require or endorse any religious activity, and the only public expenditure associated with the holiday is the continued pay accrued by public employees. We are persuaded that nothing more is ‘established’ by the Hawaii statute than an extra day of rest for a weary public labor force.” At 782.
3. Koenick v. Felton, 973 F.Supp. 522 (D. Md. 1997). The plaintiff, a teacher, challenged the constitutionality of a Maryland statute providing for a “public school holiday” from “[t]he Friday before Easter and from then through the Monday after Easter.” At 524. The plaintiff alleged she has been required to use personal leave days or leave without pay. The school calendar does provide for school closing for Yom Kippur and Rosh Hashanah but not Passover. *Id.*, note 1.

The school enunciated secular reasons for closing school on certain Jewish and Christian holy days: There would be a high number of teachers and students absent from school if classes were conducted. In granting summary judgment to the school, the court observed that that residual accommodation of religion does not invalidate a statute where a “plausible secular purpose...may be discerned from the face of the statute.” At 526, with additional citation omitted. In addition, the statute neither requires nor encourages attendance at religious services, nor are teachers or students restricted from requesting excused absences to attend their own religious observances. There is no coercion on one hand or disapproval on the other. The court also found that Easter has become a “largely secularized holiday,” though not to the extent Christmas has become. The “secular effects” of the statute—an annual spring break—are “clearly predominate.” At 527. The intent and practice are neutral and have “no religious significance” given that “Easter has become a secularized holiday.” At 528. The court cited with favor the Cammack case and distinguished the Metzl dispute. Metzl, the court noted, dealt with the establishment of Good Friday as a legal holiday. The Maryland statute does not mention Good Friday. At 529. “[E]quality of treatment is not changed by the ancillary fact that some Christians may also recognize the Friday before Easter as a religious holiday.” At 530.

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<sup>7</sup>Although there was an enunciated economic and recreational benefit by Hawaii’s territorial legislature, the 7th Circuit in Metzl, *supra*, at 622, rejected the “Hawaii effect”: “Illinois is not Hawaii. No one goes water skiing on Lake Michigan in mid-April.”

## RELIGIOUS SYMBOLISM AND ACCOMMODATION

In the Cammack case, *supra*, the 9th Circuit discussed the problem of “political divisiveness” where minority faith traditions or non-religious persons or entities militate for official recognition of days or periods of time important to them.<sup>8</sup> Public schools find themselves between those who would sanitize the public schools of any religious studies or mention and those who wish to use the public schools as a means to promote denominational and theological preference. While the latter circumstance has been well litigated, the “sanitization” cases have not. But it seems evident from U.S. Supreme Court decisions that any “relentless and all pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution...” as evincing hostility towards religion, which is as much proscribed as endorsement. Lee v. Weisman, 505 U.S. 577, 589; 112 S.Ct. 2649, 2661 (1992). The following two cases illustrate positive approaches to balancing the religious and cultural diversity of the American population while passing constitutional muster.

1. Florey v. Sioux Falls Dist. 49-5, 619 F.2d 1311 (1980), *cert. den.*, 449 U.S. 987, 101 S.Ct. 409 (1980). In response to complaints that Christmastime assemblies were religious exercises, the school board established a broad-based committee of citizens to review the school district’s practices in light of constitutional requirements. The committee’s eventual report to the school board delineated permissible school activity but also recommended a policy to promote understanding and tolerance of various faith traditions while remaining neutral toward religion and non-religion. The school board adopted the policy, recognizing that one of the school district’s goals “is to advance the students’ knowledge and appreciation of the role that our religious heritage has played in the social, cultural, and historical development of civilization.” At 1319. To implement this policy, the school board arranged the school calendar so as not to conflict with religious observances, so as to incorporate “the teaching *about*—and not *of*—religion...in a factual, objective and respectful manner.” At 1320. (Emphasis original.) Religious themes in the arts, literature, history, music, and drama were permitted “if presented in a prudent and objective manner.” At 1319. Religious symbols, such as a cross, a crescent, a Star of David and such were “permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature.” At 1319-20.

The district court refused to enjoin the implementation of the policy, and the 8<sup>th</sup> Circuit Court of Appeals affirmed. The Court, in affirming, noted “[t]he close relationship

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<sup>8</sup>“Political divisiveness” has been raised in Establishment Clause cases as an argument that to permit the challenged activity to continue would provoke political battles and divide the community. The U.S. Supreme Court has not determined a constitutional infringement based upon “political divisiveness” alone, but has required a showing of “a direct subsidy to religious schools or colleges...” in order to warrant inquiry into “political divisiveness.” Lynch v. Donnelly, 465 U.S. 668, 684; 104 S.Ct. 1355, 1365 (1983).

between religion and American history and culture,” at 1313, and that “total separation [between church and state] is not possible in an absolute sense.” At 1314, citation omitted. The court found the policy to be neutral and “not promulgated with the intent to serve a religious purpose.” At 1314. Religious symbols were used only as teaching aids and resources, and were displayed only temporarily.

We view the thrust of these rules to be the advancement of the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.

Id. The Court likewise did not find that the primary effect was to advance or inhibit religion. “The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited.” At 1315, emphasis original. The study of religion, when objectively presented as part of a secular program of education, is not forbidden. Id. The court expanded upon the concept of “study” to mean not only classroom instruction but public performances as well (but not religious ceremonies). At 1316. The fact that some people may be affected by religious references in a secular course of study does not invalidate the inclusion of such references. “It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents.” At 1317. In addition, “[t]he public schools are not required to delete from the curriculum all materials that may offend any religions sensibility.” At 1318.

2. Clever v. Cherry Hill Township Bd. of Education, 838 F.Supp. 929 (D. N.J. 1993). In December, 1991, school officials removed a Nativity display from a bulletin board in one of its elementary schools. This resulted in a significant brouhaha. The school board formed a “Seasonal Observance Committee,” which, as in Florey, *supra*, reported back to the school board with several recommendations for including cultural, ethnic, or religious themes in the school’s educational programs. The school board adopted the recommendations as policy, and developed procedures to “foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs.” The school board added:

...Programs which teach about religion and its role in the social and historical development of civilization and in the social and political context of world events do not violate the religious neutrality of public schools. Schools may teach about but not promote religion.

At 932. Although the school board relied heavily upon Florey, it did not restrict its curricular objectives to holidays that had both religious and secular relevancy. The school board broadened the use of religious symbols by including these in school calendars along with secular holidays. Appropriate seasonal displays were also

permitted, but were restricted to no more than ten days. Id.

Cherry Hill's policy also mandates that the calendars be used in conjunction with a list of books and other resource materials available in the school library relating to holidays identified in the calendar. Teachers are provided with descriptions of each holiday to "be utilized by staff members as an educational resource throughout the school year.

At 933. The school board's primary purpose was "to promote the educational goal of advancing student knowledge about our cultural, ethnic, and religious heritage and diversity." At 934.

The federal district court, in granting summary judgment to the school board, found: (1) the context within which the religious and secular symbols are employed does not endorse any religion; (2) the displays are curriculum-related and are not permanent; (3) there is no "overt religious exercise" associated with the policy, and thus no religious coercion; (4) there is no denominational preference; (5) there is no denominational hostility; (6) the policy "has a genuine and demonstrable secular purpose" (at 939); (7) the "primary effect" of the policy does not endorse any particular religion nor favor religion over non-religion (at 940); and (8) the policy and its procedures do not "unduly entangle the government in state church relationships" (at 942).

The court also observed at 939:

Religion is a pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study. It is hard to imagine how such a study can be undertaken without exposing students to the religious doctrines and symbols of others.

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We learn this lesson [mutual understanding, respect, and tolerance] not by being offended or threatened by the religious symbols of others, but by understanding the meaning of those symbols and why they have the capacity to inspire intense emotions. If our public schools cannot teach this mutual understanding and respect, it is hard to envision another societal institution that could do the job effectively.

The court's decision is not only well written but includes seven (7) exhibits detailing the school board's policies, its procedures, its guidelines, a compilation of religious symbols, two calendar months from the school calendar, and explanatory text to guide teachers in explaining the symbols. The two calendar months and explanatory text are included with

this article and immediately follow.

For related issues, please refer to these previous articles in QR: “Choral Music and the Establishment Clause”; “Challenges to Curriculum”; “Curriculum and Religious Beliefs”; “Evolution vs. ‘Creationism’”; “Halloween”; “Opt-Out of Curriculum”; and “Proselytizing by Teachers.”

Exhibit E

| NOVEMBER '93   |  |  |           |   |                                   |  |
|--|--|--|-----------|---|-----------------------------------|--|
| SUNDAY   | MONDAY   | TUESDAY  | WEDNESDAY | THURSDAY  | FRIDAY                            | SATURDAY   |
|  | 1  | 2<br><br>Election Day | 3         | 4   | 5                                 | 6  |
| 7  | 8  | 9  | 10        | 11<br><br>Veterans Day     | 12<br>Birthday of Bahá'í (Bahá'í) | 13<br><br>Gandhi Birthday |
| 14<br><br>American Education Week<br>Nov. 14-20 | 15<br>Chickadee-ee<br>Sesun, Pheo<br>Three Festival<br>(Sesun)   | 16   | 17        | 18  | 19                                | 20   |
| 21   | 22   | 23   | 24        | 25<br><br>Thanksgiving Day | 26                                | 27   |
| 28   | 29<br><br>Hanshi's Birthday<br>(Hanshi) | 30   |           |   |                                   |  |

EXHIBIT F

| DECEMBER '93   |        |         |  |  |   |  |
|--|--------|---------|--|--|---|--|
| SUNDAY   | MONDAY | TUESDAY | WEDNESDAY  | THURSDAY   | FRIDAY  | SATURDAY   |
|  |        |         | 1  | 2  | 3   | 4  |
| 5<br><br>National Day<br>(Tshafadi)           | 6      | 7       | 8<br><br>Bodhi Day<br>Buddha's<br>Enlightenment | 9<br><br>Chanukah     | 10<br>Human Rights<br>Day   | 11   |
| 12   | 13     | 14      | 15<br><br>Bill of Rights<br>Day               | 16<br><br>Laguardas | 17  | 18   |
| 19   | 20     | 21      | 22   | 23   | 24  | 25<br><br>Christmas |
| 26<br><br>Kwanzaa<br>(African-<br>American) | 27     | 28      | 29   | 30   | 31<br><br>New Year's Eve |  |

## EXHIBIT G

### **In November ...**

A special week in November is American Education Week, November 14-20. A highlight of American Education Week is National Community Education Day on Tuesday, November 16, celebrating partnerships between schools and their communities.

#### **November 2 Election Day (United States)**

For many national, state and local elections, Election Day is held on the first Tuesday after the first Monday in November.

#### **November 11 Veterans Day (United States)**

This national holiday now honors all who have served the nation in the armed services. It was originally called Armistice Day, commemorating the signing of the Armistice that ended World War I in 1918. By the terms of the Armistice, the fighting ended at 11:11 a.m. on November 11, the eleventh minute of the eleventh hour on the eleventh day of the eleventh month.

#### **November 12 Birthday of Baha'u'llah (Baha'i)**

This date marks the birthday of the prophet-founder of the Baha'i faith. Baha'u'lla (1817-1892) was a member of one of the great aristocratic families of Persia who gave up his wealth and position to preach to people about the unification of all humanity and the coming of a world civilization.

#### **November 13 Divali (Hindu)**

Divali, one of the most important festivals of the year for Hindus, is a new year festival, celebrated in the Hindu month of Kartika. It lasts for five days and is a festival of lights. Lamps are lit for the whole five days beside roads and streams, and on roof edges and window sills, to enable Lakshmi, the goddess of beauty, prosperity and good luck, to find her way to every home. Homes are decorated with flowers, and families visit and share festive meals.

#### **November 15 Shichi-so-san—Seven, Five, Three Festival (Japan)**

This day is celebrated in Japan by children who are seven, five, and three years old. They dress in their best clothes, enjoy special candy that is called “thousand year” candy, and are taken to shrines by parents to pray for a long, healthy and happy life.

### **November 25 Thanksgiving Day (United States)**

This national holiday is a time for giving thanks for the harvest and for the good things the year has brought. The celebration at Plymouth, Massachusetts in 1621 was the first American thanksgiving observance. The first nationwide observance was in 1863, when President Abraham Lincoln issued a proclamation designating the last Thursday of November as a day of national thanksgiving. Congress made Thanksgiving Day a federal holiday in 1941.

### **November 29 Nanak's Birthday (Sikh)**

Nanak (1469-1538) was the founder of Sikhism, which comes from the Hindi word *sikh*, meaning "disciple." Sikhism, one of the three religions most widely practiced in India, is based on Nanak's teachings about the unity of one god and all peoples.

### **In December ...**

#### **December 5 National Day (Thailand)**

On this holiday the people of Thailand renew their commitment to democracy while celebrating the King's birthday with religious ceremonies in the temples.

#### **December 8 Bodhi Day-Buddha's Enlightenment (Buddhist)**

Among Mahayana Buddhists, this holiday commemorates Buddha's attaining perfect understanding and happiness. This date is based on the Japanese Buddhist calendar.

#### **December 9 Chanukah (Jewish)**

This Jewish holiday, also called the Festival of Lights, lasts eight days and begins at sundown on December 8. It marks the first recorded battle for religious freedom fought 2,000 years ago, when the Maccabee family led a rebellion against invaders who had captured the city of Jerusalem. It also commemorates the rededication of the Temple by the Maccabees after their victory. The Chanukah menorah, a nine-branched candle-holder, is lit each night in Jewish homes to symbolize the historical and religious significance of the holiday. Chanukah is celebrated happily by Jewish families, with songs, games and the exchanging of gifts.

#### **December 10 Human Rights Day**

On this day in 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights, the first such statement by an international body.

### **December 15 Bill of Rights Day**

Often marked by presidential proclamation, this day is the anniversary of the adoption of the first ten amendments to the United States Constitution in 1791.

### **December 16 Las Posadas (Mexico)**

This nine-day celebration is a special Mexican way of commemorating the events that lead up to Christmas. It is observed in Mexico with solemn pageants, candlelight processions and joyful parties. After a religious ceremony on *Noche Buena* (Christmas Eve), there is a fiesta featuring the pinata, a decorated container filled with toys and candy. Children, blindfolded, take turns to try to break the pinata with a wooden stick. When the pinata is broken, the children scramble for the goodies.

### **December 25 Christmas (Christian)**

On this major Christian holiday, Christians around the world celebrate the birth of Jesus Christ in a humble stable or barn in Bethlehem. For Christians, Jesus Christ is the Savior, the Son of God. The birth of Jesus is often pictured in a Nativity scene which shows the baby Jesus with parents Mary and Joseph. A message of the season is peace on earth and good will to people everywhere. At Christmas time, many Christians decorate their homes with trees and lights and exchange gifts. They go to church, celebrate with family, and enjoy singing Christmas carols that tell the story of the first Christmas.

### **December 26 Kwanzaa (African-American)**

Kwanzaa, which begins on December 26 and lasts until January 1, is an African-American holiday that celebrates family life and African-American traditions. The name “Kwanzaa” means “the first” or “the first fruits of the harvest.” Fruits and vegetables are often part of holiday meals because Kwanzaa is based on the harvest festivals of Africa. An important message of Kwanzaa is education. The holiday teaches respect for the family and community, and for learning and sharing African-American traditions and achievements. Every night of Kwanzaa a new candle is lit and placed in the *kinara*—a candleholder with seven branches.

### **December 31 New Year's Eve**

## **PEER SEXUAL HARASSMENT REVISITED**

(Article by Dana L. Long, Legal Counsel)

**QR** Oct.-Dec.: 97 contained an article on Peer Sexual Harassment that discussed the conflict among various courts in the treatment of complaints brought pursuant to Title IX of the Education Amendments of 1972 (Title IX). Since the writing of that article, the body of reported judicial decisions has continued to grow and additional federal district courts and Circuit Courts

of Appeal have added opinions to enlighten or confuse this evolving area of law. Most notably, conflicts occur in the area of whether there is any liability on the part of the school in instances of student-on-student sexual harassment, and if so, whether actual or implied knowledge on the part of school officials is required.

In Doe v. Oyster River Cooperative School District, 992 F.Supp. 467 (D.N.H. 1997), a group of seventh grade girls wrote an unsigned letter to the assistant principal complaining of peer sexual harassment. When no action was taken in response to their complaint, the students went in person to see the assistant principal during the last week of school. When he was unavailable, they spoke with the guidance counselor who reported their concerns to the assistant principal. The girls were told not to tell their parents about the complaint as it would only lead to a lawsuit. The school began some disciplinary actions over the summer, but failed to follow through. At the start of the next school year, the harassment continued. The district court determined that a school may be liable under Title IX for peer sexual harassment if the harassment is sufficiently severe or pervasive such as to create a hostile or abusive environment. Further, the school can be liable if a school official knew, or in the exercise of reasonable care should have known of the harassment's occurrence unless the official can show he took appropriate steps to stop it.

The Eighth Circuit Court of Appeals reviewed the district court's ruling granting judgment as a matter of law in favor of the school district in Bosley v. Kearney R-1 School District, 140 F.3d 776 (8<sup>th</sup> Cir. 1998).<sup>9</sup> While the plaintiff's complaint was brought pursuant to Title IX, the Circuit Court's decision specifically did not determine whether public school districts may be liable for their failure to prevent or remedy student-on-student sexual harassment. For purposes of this case only, the Circuit Court assumed that such liability existed and assumed the elements of such a claim to be those set forth in the district court's jury instructions. After a jury verdict in favor of the plaintiff student, the district court granted judgment as a matter of law in favor of the school district. In affirming the district court, the Circuit Court found there was insufficient evidence from which a jury could reasonably conclude that because of the student's sex, the school district intentionally subjected her to a sexually hostile environment. The only evidence which supported the plaintiff's contention was a statement of the principal that "boys will be boys," which was immediately followed by the principal's statement that she would talk to the boy involved. This was found to be insufficient to find the school intentionally discriminated against the plaintiff.

The Ninth Circuit Court of Appeals revisited its previous ruling addressing school officials' assertions of qualified immunity in Oona R.-S.- By Kate S. v. McCaffrey, 143 F.3d 473 (9<sup>th</sup> Cir. 1998). The Court's earlier opinion<sup>10</sup> was withdrawn, but the Court again upheld the district court's denial of the school officials' motion for qualified immunity, finding that at the time of

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<sup>9</sup>See "Peer Sexual Harassment" **QR** Oct.-Dec.: 97 for discussion of the earlier district court decision found at 904 F.Supp. 1006 (W.D.Mo. 1995).

<sup>10</sup>112 F.3d 1207 (9<sup>th</sup> Cir. 1997).

the alleged harassment, the law was clearly established such that school officials were put on notice of their responsibilities under Title IX.<sup>11</sup>

In a case of first impression in the Fourth Circuit, the Court found that a school may be liable under Title IX for its discriminatory actions. Although this case involved college students, the Court's analysis could apply as well to public schools. In Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949 (4<sup>th</sup> Cir. 1997), a female student was raped by two members of the college football team. In conducting disciplinary proceedings, the college found insufficient evidence to take any action against one of the alleged perpetrators. The other male student was ultimately suspended from school for one year, but the suspension was deferred until after his graduation and he continued to attend school on a full athletic scholarship. The Fourth Circuit reviewed the case law from other jurisdictions and determined that under Title IX a plaintiff must claim that she belongs to a protected group and that she was subjected to unwelcomed sexual harassment that was based on sex. The harassment must be sufficiently severe or pervasive to create an abusive educational environment and there must be some basis for establishing institutional liability. In reversing the district court's dismissal of the plaintiff's complaint, the Circuit Court determined the plaintiff had sufficiently stated a claim under Title IX. The Fourth Circuit rejected the Fifth Circuit's analysis of a Title IX case<sup>12</sup> finding that the plaintiff does not seek to hold the school responsible for the acts of third parties, but rather to hold the school liable for its own discriminatory acts in failing to remedy a known hostile environment.

The Seventh Circuit Court of Appeals has also had the opportunity to address the issue of student-on-student sexual harassment in the context of Title IX. In making its determination, the Court reviewed the holdings of the three other circuit courts that had addressed the issue.<sup>13</sup> The Seventh Circuit held

that a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place. We reject the district

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<sup>11</sup>The Circuit Court found that the Supreme Court analogized the duties of school districts to remedy sexual harassment under Title IX to an employer's duty under Title VII to remedy peer sexual harassment in the workplace. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct 1028 (1992).

<sup>12</sup>Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5<sup>th</sup> Cir. 1996).

<sup>13</sup>Davis v. Monroe County Board of Education, 120 F.3d 1390 (11<sup>th</sup> Cir. 1997)(*en banc*); Rowinsky, supra; and Brzonkala, supra.

court's further requirement that plaintiffs in such cases plead or prove that the recipient, or any of its officials, failed to respond as a result of sexually discriminatory intent. The failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, she has alleged the sort of intentional discrimination against which Title IX protects.

Doe v. University of Illinois, 138 F.3d 653, 661 (7<sup>th</sup> Cir. 1998).

Like the Fourth Circuit Court in Brzonkala, supra, the Seventh Circuit Court of Appeals determined that the Fifth Circuit Court in Rowinsky, supra fundamentally misunderstood the nature of the claim. Plaintiffs in Title IX student-on-student sexual harassment cases are not seeking to hold the school liable for the actions of the harassing students, but rather are asking that the school be held liable for its own actions or inactions in the face of its knowledge that the harassment was occurring. The Seventh Circuit also indicated the Rowinsky court misunderstood sexual harassment itself by demanding that plaintiffs allege and show that the school reacted differently to sexual harassment claims made by girls and boys.

The Seventh Circuit Court of Appeals also took into consideration the Office for Civil Rights' final policy guidance:

[A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed.Reg. 12,034, 12,039-12,040. (1997)

Doe at 667.

The Court then turned to the proper standard for notice and determined there was no reason to adopt a different standard for student-on-student harassment from teacher-on-student sexual harassment. In Smith v. M.S.D. Perry Township, 128 F.3d 1014, 1034 (7<sup>th</sup> Cir. 1997), the court rejected school liability based on a "knew or should have known" standard and adopted instead a requirement of actual knowledge. The Court applied this same standard of actual knowledge to cases involving student-on-student sexual harassment. Doe at 668.

In June, 1998, the United States Supreme Court issued a decision in a Title IX case involving teacher-on-student sexual harassment. The Supreme Court determined that damages may not be recovered for teacher-on-student sexual harassment in an implied private action under Title IX unless a school official who at a minimum has authority to institute corrective measures on the school's behalf has actual knowledge of, and is deliberately indifferent to, the teacher's

misconduct. Gebser et al. v. Lago Vista Independent School District, 138 S.Ct. 1989 (1998).

The Supreme Court's recent decision in Gebser appears to conflict in some aspects with OCR's policy guidance, particularly in the area of the standard of knowledge that must be shown on the part of school officials. In an August 31, 1998, letter to superintendents of schools, Secretary of Education Richard W. Riley reaffirmed OCR's position on its policy, noting that the Gebser decision distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX. Therefore, it is the position of the U.S. Department of Education that the obligations of schools that receive federal funds to address instances of sexual harassment have not changed.

Finally, the United States Supreme Court, on September 29, 1998, granted certiorari in Davis v. Monroe County Board of Education, Docket No. 97-843.<sup>14</sup> Pursuant to the Court's order of September 29, 1998, the case should be fully briefed by December 29, 1998. The Court's decision, which should be rendered by next summer, should provide additional guidance to schools and resolve the differences among the Circuit Courts of Appeal.

#### **COURT JESTERS: THINGS THAT GO BUMP...**<sup>15</sup>

In Audet v. Bd. of Regents for Elementary and Secondary Education, 606 F. Supp. 423 (D. R.I. 1985), a Rhode Island teacher sought to avoid reassignment to teaching general science and mathematics when he was "bumped" from his long-term guidance counselor position due to reduced student enrollment in his school district. Although "bumping" of positions by seniority was included in Rhode Island's statutes and the local collective bargaining agreement, Audet sought to avoid being bumped by seeking to relinquish his teaching licenses for mathematics, general science, and vocational electronics. When the State refused to let him resign his licenses, Audet sued the State, claiming, among other things, violation of the 13<sup>th</sup> Amendment in that the State's refusal to accept his resignation of certain teaching licenses amounted to "involuntary servitude." In a far too literate decision by federal District Court Judge Bruce M. Selya, Audet was not only met with a myriad of uncomplimentary metaphors and analogies, but eventually experienced the poetic wrath of the court for claiming that his reassignment to teaching classes

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<sup>14</sup>Davis v. Monroe County Board of Education, 74 F.3d 1186 (11<sup>th</sup> Cir. 1996). This case is also discussed in **QR** Oct.-Dec.: 97.

<sup>15</sup>The phrase "things that go bump in the night" originally appeared in an anonymous poem, *Cornish Prayer*:

From ghoulies and ghosties and long-leggety  
beasties  
And things that go bump in the night, Good Lord,  
deliver us!

he did not relish constituted a form of slavery.<sup>16</sup>

Noting that Audet “miscasts the federal district court in the role of his personal employment agency,” the court proceeded to chastise the teacher for claiming the “bumping” constituted involuntary servitude. “He has enjoyed the fruits both of his hybrid certification and of the union pact. He cannot now disown the pits.”

The teacher, the court added, did not allege that the bumping “...pavane was orchestrated with the specific (malign) intent to waltz Audet out of his wonted guidance cloister and into the less hospitable environs of the science and mathematics classrooms.... If held prisoner, he is a captive only of his myopic view of the Constitution.”

One would think this sufficient to apprise the scholar of the court’s antagonistic view of his case. However, the judge was not finished. Quoting from *The Works of George Herbert*, the judge wrote:

A notable scholar once admonished:

Goe not for every griefe to the Physician,  
nor for every quarrell to the Lawyer, nor  
for every thirst to the pot.

•••

To those sagacious words it may be added, as Audet’s lament so plainly teaches:

Goe not for every bump in the  
road of life to the Constitution.

Audet’s case, having hit several potholes,<sup>17</sup> has irretrievably stalled. The amended complaint misfires on several cylinders, and must be dismissed.

One would think *this* sufficient to apprise the scholar of the Court’s antagonistic view of his case.

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<sup>16</sup>The decision is “far too literate” in that the court utilizes a number of historical and literary allusions that send one scrambling for a dictionary (but not an abridged one). For example, he refers to Audet as “a frondeur of sorts” and “a docent.” The judge characterized the teacher’s complaint as a “jeremiad.” He also referred to Audet’s multiple licensure as “his seriatim certificates.” There are numerous other such tidbits. I would very much like to tell you what these words mean, but this would violate a standing order from your parents and teachers: Go look them up in the dictionary. Sorry.

<sup>17</sup>“Chuckholes” if you’re from Indiana.

The judge apparently felt Audet needed an additional admonishment. The following appeared as footnote 8 at 434 of the decision:

If the court may be permitted an eschatocol<sup>18</sup> of sorts:

The best of batters strike a slump;  
The minor leagues await 'em;  
The best of teachers take a bump  
When the contract's read verbatim.

But that's what makes the world  
go round,  
In an ever-changing spree;  
No qualms re: bumping have  
been found  
Until bumper becomes bumpee!

#### QUOTABLE

“The Christmas season brings with it not only sidewalk Santas, mercantile mania, and endless reruns of *It's a Wonderful Life* and *Miracle on 34th Street*, but also a spate of constitutional litigation testing the limits to which governmental or public bodies may legally join in the festivities.”

District Judge Joseph E. Irenas in Clever v. Cherry Hill Tp. Bd. of Education, 838 F.Supp. 929, 931 (D. N.J. 1993). This case is discussed above in “Religious Symbolism and Accommodations.”

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<sup>18</sup>Look it up.

## UPDATES

### Medical Services, Related Services, and the Role of School Health Services

As reported in **QR J-S: 97** and **QR O-D: 97**, the distinction between what is a “related service” and what is a “medical service” becomes blurred the more intense the services required. Some courts have adopted a “bright line” analysis, finding services to be “related,” irrespective of expense, if the service does not have to be administered by a physician. Other courts employ an “undue burden” test, finding services to be medical in nature if the services are intense and expensive, and require skilled care beyond the scope of typical school health services. Schools are not required to provide “medical services” as support services under the Individuals with Disabilities Education Act (IDEA).

There is a split among the federal Circuit Courts of Appeal. The U.S. Supreme Court has accepted for review a “bright line” analysis case arising from the 8th Circuit Court of Appeals. Cedar Rapids Comm. Sch. Dist. v. Garrent F., 106 F.3d 822 (8<sup>th</sup> Cir. 1997), *cert. granted*, \_\_\_\_\_ U.S. \_\_\_\_\_, 118 S.Ct. 1793 (1998). The 7<sup>th</sup> Circuit Court of Appeals rendered its first decision in this area on July 27, 1998, adopting a hybrid form of “bright line” and “undue burden” analyses.

In Morton Comm. Unit Sch. District No. 709 v. J.M., 152 F.3d 583 (7<sup>th</sup> Cir. 1998), the 7<sup>th</sup> Circuit upheld an Illinois federal district court that found the public school district had to provide under IDEA as related services to a 14-year-old student who was medically fragile the following services: tracheostomy tube care, monitoring of life support equipment, suctioning of his airway, and application of his hourly eye medications. The student required one-to-one attention. The court found that both the parents and the school have “extreme positions.” The court rejected the parents’ position that any service, no matter how expensive, is a related service under IDEA and must be provided so long as this does not require a physician. The court noted that the advancement in medicine and technology have created “medically fragile” or “technology dependent” children who otherwise would not have survived. The “cost and character of services” can be relevant in determining whether a service is “related” or an excludable “medical” service.

The 7<sup>th</sup> Circuit also rejected the school’s “extreme position” that if school health services cannot provide the service, then it is an excludable medical service. This is a “non sequitur,” the court wrote, which would make the student’s right to attend school dependent upon a school district’s administrative structure and the number of students with disabilities.

While the 7<sup>th</sup> Circuit observed IDEA does not contain an “undue burden” defense, it is somewhat implicit in the limiting definition of “related services” and the minimal requirement that an education be “appropriate” rather than optimal. The 7<sup>th</sup> Circuit decided to not take sides. Although “undue burden” might be relevant in some cases, it would likewise be “arbitrary” to limit “medical services” to those services “rendered by a licensed physician.”

Because the school did not prove that one-to-one nursing care would be an “undue burden,” the

school had to provide the service. The court added: “[W]e are happy that the Supreme Court will be grappling with the issue” of medical versus related services.

### Access to Public Records and Statewide Assessments

In **QR** April-June: 98, the issue of the extent to which members of the public may seek access to statewide assessments was discussed. There have been varying results, with Indiana, Texas, Iowa, and California law recognizing the need to restrict access in order to ensure reliability and validity of future test items, but Ohio recognizing a qualified right to review such tests even though items will be used again. Kentucky has now weighed into the balancing act between broadly stated public access policies and a rationally related need to limit disclosure of test items that will or may be used again.

1. Triplett v. Livingston County Bd. of Ed., 967 S.W.2d 25 (Ky. App. 1997), reh. den. (1998). This case involved a challenge to the Kentucky Instructional Results Information System (KIRIS), a statewide assessment used as one measure of school district performance. The KIRIS is similar to ISTEP+. It utilizes multiple choice questions as well as open-ended responses and essay questions. The school district required all students to complete all parts of the KIRIS assessment before advancing to the next grade or graduating. The plaintiffs objected to their children participating in KIRIS, basing the objection on religious reasons. The school did permit the mother to view the test prior to its administration, but did not allow her to take notes or make copies. Because the Triplett children did not participate in KIRIS, one was not promoted and the other did not graduate. The Triplett children sued to enjoin the school from preventing the one student from graduating and for a declaratory judgment that the school violated their privacy, infringed upon the exercise of their religion, interfered with their parental rights, and denied them due process (in essence, to find the KIRIS unconstitutional). The trial court found the KIRIS assessment did not violate any state or federal law, but did agree with the Triplett children that the KIRIS should be “made open for review by the public.”

The Kentucky Court of appeals affirmed the finding regarding the lack of state or federal violations but reversed the trial court as to public access of the KIRIS. The following are notable findings.

- “The KIRIS exam requires no advance preparation beyond the student’s normal academic program; hence, further notice would have served no purpose.” (At 29).
  - “[T]he KIRIS exam should not be open for general public viewing without a special showing of necessity beyond simple curiosity as to its content. In our view, permitting the exam to be indiscriminately viewed by the public would interfere with the accomplishment of the objectives for which it was devised. It would certainly jeopardize the integrity and reliability of the exam.” (At 34).
2. Rathmann v. Bd. of Directors of the Davenport Comm. Sch. Dist., 580 N.W.2d 773 (Iowa 1998). This is a continuation of the brouhaha begun in Gabrilson v. Flynn reported in

**QR** April-June: 98 and cited in the Triplett court, *supra*. Gabrilson involved a school board member who believed the graduation examination being developed by the district violated a host of federal constitutional provisions and statutes. She began to release test items to the media, including a local radio talk show host. When she sought additional assessment records from the school as “public records,” the school declined, citing state law that made such records confidential. The Iowa Supreme Court upheld the confidentiality of the examination, noting that “public disclosure would destroy the objective of the test.” Gabrilson, 554 N.W.2d at 271-73. However, the Iowa Supreme Court also noted that a school district cannot deny access to such information when requested by a school board member (even though a school board member can be enjoined from copying, publishing, or otherwise disseminating such confidential information). Id., at 276; Rathman, 580 N.W.2d at 775. Rathman, also a school board member, sought certain district records, but the district assessed her fee for locating and retrieving the records. The Court, although noting Iowa law permits the assessment of a “retrieval fee” when members of the public request records, held that a school district may not assess such a fee on one of its school board members when: (1) the request is reasonable; (2) the request is in connection with the discharge of the school board member’s responsibilities; and (3) the school board member has a right to see the records. (At 780).

### Exit Examinations

Florida State Dep’t of Ed., 28 IDELR 1002 (OCR 1998). In order to receive a standard high school diploma in Florida, students must pass both the mathematics and communications sections of the high school competency test (HSCT). Although state regulation and test administration guidelines permit accommodations and modifications where individual need has been determined, and these accommodations and modifications have been included in respective students’ Individualized Education Programs (IEPs) or Sec. 504 plans, “the communication skills section of the HSCT is designed to test a student’s reading and comprehension skills and, therefore, the validity of the test would be compromised if the reading items were read and explained to the student.” At 1003. This accommodation would not be allowed on this section of the HSCT, although other accommodations or modifications may be employed. The Office for Civil Rights (OCR) of the U.S. Department of Education determined Florida’s testing procedures for HSCT did not violate either Sec. 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act (ADA), Title II. OCR addressed a complaint from a student with disabilities whose IEP contained the following accommodations for district and statewide assessments: “flexible scheduling [and] flexible setting and oral presentations *within test guidelines*” (Id. Emphasis supplied by OCR.) “Flexible presentation” meant the student may need to have directions read to the student or summarized. “Rereading directions may be necessary. Some language or directions may need to be simplified or the student may need to restate the directions in his/her own words. Proctors may answer student questions about any test directions. Test items language may not be reworded, and proctors may not answer student questions about the wording of test questions or interpret test questions for students. Reading

items and passages may not be read to students.” *Id.* OCR found no discrimination because the student’s IEP “allows oral presentation only within test guidelines.” *Id.*

### Curriculum and Religious Beliefs

A number of public school districts employ selections from the Bible as part of a comparative religions course or courses in secular literature or secular history. The U.S. Supreme Court determined in 1963 that study of the Bible “when presented objectively as part of a secular program of education, may...be effected consistent with the First Amendment.” School Dist of Abington Township v. Schempp, 374 U.S. 203, 225; 83 S.Ct. 1560 (1963). Indeed, the Indiana State Board of Education’s rules for high school curriculum courses permit schools under “English language arts courses” to offer a course of study in “Biblical literature.” See 511 I.A.C. 6-1.5-1.2(2)(B).

In Gibson v. Lee County Sch. Bd., 1 F.Supp. 2d 1426 (M.D. Fla. 1998), the local school board attempted to develop a two-semester course in “Bible history.” The first semester would focus “on the Bible as a historical document through an overview of significant events that have affected the people of the Old Testament.” The second semester course would relate the historical events to the “development of religious and ethical beliefs as described in the New Testament.” The Bible would be treated as a historical document. The school board appointed a 15-member “Bible Curriculum Committee” to advise the school in the development of the course. The committee reviewed curricula from other school districts as well as a proposed curriculum offered by the National Council on Bible Curriculum in Public Schools (NCBCPS).

The committee was unable reach consensus on many points. At least three different attorneys advised them of constitutional problems and the potential for litigation that flows from teaching the Bible “as an inerrant document” and from promoting what appears to be “a single Protestant perspective.” The committee became divided, with some member submitting a minority report and others urging the school board not to adopt the majority’s recommendations. Eventually, the school board, by a 3-2 vote, adopted a curriculum for the Old Testament portion that included revisions by the attorneys. However, the school board did not consider the advice of counsel when adopting, again by a 3-2 vote, the New Testament portion, which was the one recommended by the NCBCPS. Litigation followed.

The court did not grant the plaintiffs’ request for a preliminary injunction as to the Old Testament course, finding the school board had articulated a secular reason for the course. The same was not true for the New Testament course. “[T]he account of the resurrection of Jesus Christ as recounted in the New Testament forms the central statement of the Christian religious faith.” Because “the only reasonable interpretation of the resurrection is a religious interpretation,” the court “found it difficult to conceive how the resurrection might be taught as secular literature or history.” Because of the many constitutional infirmities, the court did grant the plaintiffs’ request for a preliminary injunction with respect to the New Testament course. “It is an abuse of public trust,” the court wrote, “when elected officials ignore established legal

standards.”

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Date

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| School Health Services .....   | (J-S: 97)                                     |
| School Prayer .....  | A-J: 97)                                      |
| Service Dogs .....   | (O-D: 96)                                     |
| Statewide Assessments, Public Access to .....                        | (A-J: 98, J-S: 98)                            |
| Status Quo and Current Educational Placement .....                   | (J-S: 97)                                     |
| Stay Put and Current Educational Placement .....                     | (J-S: 97)                                     |
| Strip Search .....   | (J-S: 97)                                     |
| Suicide: School Liability .....                                      | (J-S: 96)                                     |
| Symbolism, Religious .....   | (J-S: 98)                                     |
| Teacher License Suspension/Revocation .....                          | (J-S: 95)                                     |
| Teacher Free Speech .....  | (J-M: 97)                                     |
| Textbook Fees .....  | (A-J: 96, O-D: 96)                            |
| Time-Out Rooms .....   | (O-D: 96)                                     |
| Title I and Parochial Schools .....                                  | (A-J: 95, O-D: 96, A-J: 97)                   |
| Triennial Evaluations .....  | (J-S: 96)                                     |
| Truancy, Habitual .....  | (J-M: 97)                                     |
| Valedictorian .....  | (J-M: 96)                                     |
| Voluntary School Prayer .....  | (A-J: 97)                                     |
| Volunteers In Public Schools .....                                   | (O-D: 97)                                     |
| Vouchers and Parochial Schools .....                                 | (A-J: 98)                                     |